IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.11.2007

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN

Writ Petition Nos.27576 and 27577 of 2007

M/s.Sharda Industries,
rep. by its Partner Khimraj Sakariya,
No.3, Genguraman Street,
Chennai - 600 003 .. Petitioner in both the writ petitions

vs.

The Commercial Tax Officer,
Evening Bazaar Assessment Circle,
191, N.S.C. Bose Road,
Chennai - 600 001 .. Respondent in both the writ petitions

W.P.No.27576 of 2007:

This writ petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the respondent in TNGST.0340206/2000-01, dated 31.3.2007, and quash the same as illegal and against the principles of natural justice and fair play and to direct the respondent to furnish the statement and records relied upon in the revision and provide opportunity of cross examination of third parties.

W.P.No.27577 of 2007:

This writ petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the respondent in TNGST.0340206/99-2000, dated 31.3.2007, and quash the same as illegal and against the principles of natural justice and fair play and to direct the respondent to furnish the statement and records relied upon in the revision and provide opportunity of cross examination of third parties.

For petitioner : Mr.D.Trilokchand Chopda
For respondent : Mr.R.Mahadevan
Additional Government Pleader (Tax)

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C O M M O N O R D E R

Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), takes notice for the respondent.

2. Heard Mr.D.Trilokchand Chopda, the learned counsel appearing for the petitioners as well as Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), appearing for the respondent.

3. With the consent of the learned counsels appearing on either side, the writ petitions are taken up for final disposal.

4. Since the issues involved in the above writ petitions have arisen out of the same facts and circumstances, a common order is passed.

5. It is submitted that the petitioner industry is a manufacturer and exporter of Stainless Steel Utensils and it is an assessee on the files of the respondent. The respondent, after checking and verifying the accounts of the petitioners, had passed assessment orders for the years 1999-2000 and 2000-01, dated 23.2.2001 and 31.7.2002, respectively.

6. It is further submitted that the place of the business of the petitioners was inspected, on 17.12.2004, and a statement was recorded. Apart from the verification, the details of purchases made from M/s.Aashana Enterprises and M/s.Kamalesh Enterprises were verified. Thereafter, the inspecting authorities had once again verified the purchases and sales, on 7.2.2005, and the petitioner had filed the copies of the records and other details, including the written submissions, dated 14.2.2005.

7. It is further submitted that the respondent had proposed to revise the assessment order and had sought to levy tax, under Section 7-A of the Tamil Nadu General Sales Tax Act, 1959, on purchases made from M/s.Aashana Enterprises and M/s.Kamalesh Enterprises making an assessment on deemed sale value and levied penalty, under Sections 16(2) and 10(3) of The Tamil Nadu General Sales Tax Act, 1959, (hereinafter referred to as "the Act"). The petitioner had filed interim objections, dated 6.3.2005 and 26.11.2005, respectively, for both the assessment years requesting the respondent to furnish the copies of the records and the statements relied upon for revising the assessment orders and for an opportunity of cross-examining the dealers along with their accounts, personal hearing and for time for submission of a final reply in the matter.

8. It is further submitted that the petitioners had appeared and produced all the records before the enforcement authorities and had also filed written submissions, dated 14.2.2005, along with the records relating to the purchases from the dealers, sales made by the petitioners and particulars on receipt of the goods, payment etc. The records produced

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by the petitioners had clearly shown the delivery of goods at the petitioners' factory directly by the sellers and unloading of the goods by the petitioners' employees. Therefore, the proposed revision is against the principles of natural justice and fair play, as it is contrary to the records available and without giving an opportunity to the petitioners of cross-examination of the persons concerned and without furnishing the copies of the records and statements relied upon by the enforcement authorities.

9. Among the various grounds stated in the affidavit filed in support of the writ petitions, the petitioners had also submitted that denial of the copies of the records and an opportunity of cross-examining the persons, on whose statements the enforcement authorities had arrived at their conclusions to fasten the liability on the dealers such as the petitioners, is totally against the well established principles of law and contrary to the statutory provisions of the Act as well as the various decisions of this Court and the Apex Court.

10. It has been submitted by the petitioners that the respondent in the above writ petitions had sought to revise the original assessment orders on the basis of the statement of one S.Mahendra Kumar Jain for the levy of tax and penalty on the petitioners. The petitioners had filed an interim objection requesting the respondent to furnish the copies of the records and the statement relied on for the revision of the assessment order and for an opportunity of cross-examining S.Mahendra Kumar Jain, while exercising the powers as provided for under Section 54 of the Act. However, the respondent had passed the impugned order without furnishing the copies of the records requested for and without providing an opportunity of cross-examination. Therefore, the petitioners have been constrained to file the above writ petitions raising various grounds stating that

> "a) the order passed without furnishing copies of the records relied upon and providing an opportunity of cross examination is against the principles of natural justice and fair play and the principles laid down by the Supreme Court and the Madras High Court.
>
> b) the respondent ought to have initiated action against the witnesses for failing to appear for cross-examination in pursuance to the statutory summons issued to them instead of confirming the proposal on flimsy grounds.
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> c) the petitioner having discharged the burden of proof in support of their purchases at the time of the original assessment proceedings and in the case of revision of assessment, the burden is on the respondent

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as per the provisions of the Tamil Nadu General Sales Tax Act, 1959.

d) the department, having accepted the sales and purchase made by the sellers and passed the assessment orders, had erred in disallowing the purchases in the hands of the purchasers like the petitioner contrary to the provisions of the Act, and the Rules made thereunder.

e) as per Section 4 of the Act, the levy of tax on the sale of declared goods is at the point of first sale and the same cannot be shifted to the subsequent seller as per the principles laid down by the Supreme Court in the case of Shanmuga Traders in 114 ST 1.

f) the purchases made were duly accounted for and the same was accepted at the time of the original assessment proceedings and there was no omission or suppression or seizure of incriminating records. The mere disallowance of purchases will not be a ground to attract penalty as per the provisions of the Act.

g) there is no jurisdiction to make estimated addition towards probable omission under Section 16 of the Act.

h) as per Rule 15(6) of the Tamil Nadu General Sales Tax Rules, the concurrence of the Deputy Commissioner shall be obtained if the assessment results in imposition of tax of Rs.1,00,000/- and above. Hence, the impugned order, made without such concurrence, is illegal.

i) as per the instructions of the Commissioner of Commercial Taxes, the proposal on the basis of inspection are to be deferred till further report is received from the enforcement wing.

11. It is further submitted by the learned counsel for the petitioner that in similar circumstances, certain assessment orders have been challenged before this Court by way of writ petitions filed by the petitioners therein and this Court had passed orders on merits, after hearing the parties concerned, setting aside the impugned orders and directing the respondents therein to pass orders afresh after furnishing the copies of the records relied on by them and by providing an opportunity of cross-examining the witnesses, on whose statements the impugned orders had been passed.

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12. The learned counsel appearing for the petitioners had placed before this Court some of the orders in which such directions had been given. The learned counsel appearing for the petitioners had also cited various decisions of the Supreme Court as well as of this Court in support of his contentions to show that when the principles of natural justice and fair play are not strictly followed, while passing the impugned orders, such orders passed by the respondents cannot be sustainable in law.

13. The learned counsel appearing for the petitioners had also cited various decisions of the Courts of law, including the decision rendered by the Supreme Court in STATE OF H.P. Vs. GUJARAT AMBUJA CEMENT LTD., (2005) 142 STC 1 (SC), which had been followed by the First Bench of this Court in its decision in MURUGAN ENGINEERING PRODUCTS Vs. CTO, COIMBATORE ((2006) 148 STC 419(Mad)), to point out that the question of alternative remedy would not arise when the action initiated by the respondents are under certain provisions of law which are ultra vires or when the impugned orders have been passed in violation of the principles of natural justice.

14. The learned counsel appearing on behalf of the petitioners had placed reliance on the various decisions of this Court, including certain orders passed by this Court, to show that the assessment of tax and penalty made by the assessing authority, relying only upon the statements given by some persons and without affording an opportunity of cross-examining such persons by the affected parties, were invalid in law as being contrary to the principles of natural justice.

15. The learned counsel appearing for the petitioners had relied on an order passed by a learned Single Judge of this Court, dated 7.11.2006, made in W.P.Nos.41902 to 41905 of 2006, wherein the impugned assessment orders were set aside and the respondents therein were directed to furnish the copies of the documents sought to be relied upon by them, with regard to the cases relating to the petitioners. It had been further held that if the author of the sworn statements, which were relied on by the Department, was not available for cross-examination, then alone the Department may rely on those statements for arriving at a final assessment. It was also left open to the Department to rely on any other documents to arrive at the final assessment and for passing appropriate orders.

16. The learned counsel appearing for the petitioners had also relied on a decision of the Division Bench of this Court made in SREE MURUGAN ENGINEERING PRODUCTS Vs. COMMERCIAL TAX OFFICER, COIMBATORE, ((2006) 148 STC 419 (Mad)), wherein it had been held as follows:

> "Lastly, we shall deal with the plea regarding alternative remedy as raised by the Revenue. Except for a period when article 226 was amended by the Constitution (Forty-second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is

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essentially a rule of policy, convenience and discretion and never a rule of law. In Harbanslal Sahnia Vs. Indian Oil Corporation Ltd. (2003) 2 SCC 107, the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights or where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In a recent judgment in State of H.P. V. Gujarat Ambuja Cement Ltd., (2005) 142 STC 1 (SC), a three-Judge Bench of the Supreme Court after an exhaustive consideration of the earlier decisions held as follows:

> "..... That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.
>
> 24. Where under a statue there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute."

17. Per contra, Mr.R.Mahadevan, the learned Additional Government Pleader (Tax), appearing on behalf of the respondent had vehemently contested the claims made on behalf of the petitioners. He has submitted

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that the impugned orders had been issued by the assessing authority based on various documentary and oral evidence which were available and only after affording reasonable opportunity to the petitioners to represent their matters.

18. It has been submitted that pre-revision notices, dated 24.2.2005, had been issued to the petitioners, proposing to assess the turnover relating to purchases effected from a bill trader as found out during an inspection by the Enforcement Wing Officers, on 17.12.2004. It was found that the dealers had purchased iron and steel from Tvl.Aashana Enterprises and Kamalesh Enterprises to the extent of Rs.2,17,48,445.00, for the year 1999-2000, and Rs.36,56,100.00, for the year 1999-2000, against bills without actually handling the goods. The main grievance of the petitioner is that the request for summoning one S.Mahendra Kumar Jain for cross-examination was not granted and therefore, the assessment order should be set aside.

19. It has been further submitted that the alleged seller S.Mahendra Kumar Jain has been registering his business in different names without carrying on any business activity and has indulged in issuing only sham/bogus bills without there being any sale or purchase and without handling the goods which represents the subject matter of the respective sale bill. Several dealers had been claiming second sales exemption based on the bills issued by S.Mahendra Kumar Jain and several writ petitions were also filed seeking to set aside the order of assessment on the ground that no opportunity was provided to cross-examine the said S.Mahendra Kumar Jain who has rendered a statement, dated 20.08.2003, admitting that he was a bill trader and also that he had actually not sold any goods as contained in the sale bills produced by his purchasers.

20. It has been further submitted that there has been a heavy loss of revenue to the public exchequer amounting to more than rupees 700 crores and it is imperative for a competent authority to conduct a comprehensive investigation into the real nature of the transactions said to have taken place between S.Mahendra Kumar Jain and his customers.

21. It has also been submitted by the learned Additional Government Pleader (Tax) appearing for the respondent that the burden of proof that any transaction or turn over of the dealer is not liable to tax shall lie on such dealer only. If a dealer claims that he is not liable to tax on the ground that the sales or purchases are second sales or purchases, he is bound to show that there was an earlier taxable sale or purchase. Since it was found that the purchases effected by the dealers from M/s.Aashana Enterprises and M/s.Kamalesh Enterprises were not genuine and that the dealers had fabricated the records, in order to evade the demand of tax. In such circumstances, it was proposed to revise the assessment, under Sections 7(A) and 16 of the Act, and to impose a penalty on the tax due.

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22. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent, had submitted that the First Bench of this Court, while dealing with matters which were similar to those in the above writ petitions, had by its order, dated 22.6.2006, made in Writ Appeal Nos.749 and 750 of 2006 and Writ Petition Nos.17575 and 17576 of 2006, held as follows:

> "Learned counsel for the appellant in these two appeals states that the appellant will resort to the remedy of appeal as per the provisions of the Act and that he will file the statutory appeals within a period of two weeks from today. If the appeals are filed within the said period, subject to pre-condition of deposit of 25% tax component demanded, they will be entertained and decided on merits without raising the issue of limitation. The interim direction issued by the learned single Judge is set aside. The writ petitions are also disposed of. In case no appeal is filed, the Government will be at liberty to recover the taxes as per the impugned order. Both the writ appeals are disposed of. No costs. Connected miscellaneous petitions both in the writ petitions and in the writ appeals are closed."

23. The learned Additional Government Pleader (Tax), appearing on behalf of the respondent, had also submitted that there are many writ petitions filed before this Court in which the same S.Mahendra Kumar Jain is said to have made certain statements before the authorities concerned and had been absconding thereafter. If the impugned orders are set aside by this Court and the authorities concerned are directed to pass orders afresh after giving an opportunity of cross-examining S.Mahendra Kumar Jain, it would be impossible for such authorities to pass fresh orders as the said S.Mahendra Kumar Jain is either absconding or is a non-existent person. It was further submitted that the only appropriate remedy open to the petitioner is to file an appeal before the concerned authority, as provided under the law.

24. It was also submitted that even though the petitioners had an opportunity of contesting their cases before the respondent by filing all the relevant records and by cross-examining the persons, who had made the statements, based on which the impugned orders are said to have been passed, they have not availed such an opportunity. Even otherwise, the petitioners have an efficacious alternative remedy of filing appeals before the appellate authority concerned to redress their grievance, as contemplated by law. While so, it is improper for the petitioners to come before this Court by filing writ petitions, under Article 226 of the Constitution of India, to re-open the issues relating to the impugned orders passed by the respondent. In view of the orders passed by the First

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Bench of this Court, dated 22.6.2006, in Writ Appeal Nos.749 and 750 of 2006 and Writ Petition Nos.17575 and 17576 of 2006, the present writ petitions are liable to be dismissed.

25. Considering the contentions raised on behalf of the petitioners as well as the respondent and on analysing the records available, it is clear that the First Bench of this Court, while considering the issues involved in cases arising under similar facts and circumstances, had permitted the petitioners therein to file statutory appeals, within a period of two weeks from the date of the said order, on condition that the petitioner deposits 25% of the tax component demanded. On such condition being complied with, the respondent had been directed to entertain and decide the appeal on merits, without raising the issue of limitation. It was also stated that in case the appeals were not filed by the petitioners therein, the Government would be at liberty to recover the tax as per the impugned orders.

26. Considering the submissions made by the learned counsels appearing on behalf of the parties concerned and on analysing the cases cited and in view of the facts and circumstances in which the present writ petitions have arisen, this Court is of the considered view that the petitioners have an alternate appellate remedy in accordance with law to seek for the reliefs sought for by them. Once it is accepted that the petitioners have the appellate remedy, it is not open to them to come before this Court by way of filing the writ petitions under Article 226 of the Constitution of India, unless it is clearly shown that the impugned orders have been passed by the respondent by following the law, which is ultra vires or in violation of the principles of natural justice as held by the Supreme Court in State of H.P. V. Gujarat Ambuja Cement Ltd., (2005) 142 STC 1 (SC).

27. In view of the alleged loss of over rupees 700 crores to the public exchequer, as claimed by the learned counsel appearing on behalf of the respondents and in view of the allegation that devious methods have been designed by certain persons to evade payment of tax to the state government, it would only be proper for the authorities concerned to take appropriate steps to conduct a detailed enquiry into the matter, without any further delay, and to take appropriate action to recover the amounts due from the parties concerned. It is highly disturbing to note that the recovery of huge amounts of money due to the public exchequer are alleged to have been stalled by taking recourse to such illegal methods.

28. In such circumstances, this Court is of the considered view that the said order passed by the Division Bench of this Court, dated 22.6.2006, made in W.A.Nos.749 and 750 of 2006 and W.P.Nos.17575 and 17576 of 2006, would be applicable to the present cases. Further, the petitioners have not shown sufficient reason or cause for this Court to interfere by setting aside the impugned orders of the respondent, while a statutory appeal remedy is available to the aggrieved parties. Therefore,

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the writ petitions are dismissed, permitting the petitioners to file statutory appeals, within a period of two weeks from the date of receipt of a copy of this order, on condition that the petitioners, in each of the writ petitions, deposit 25% of the tax component demanded and on such condition being complied with, the respondent, after affording necessary opportunity to the petitioners as contemplated by law, is to entertain and decide the appeals, on merits without raising the issue of limitation, and pass appropriate orders, on merits and in accordance with law, within a period of eight weeks thereafter. No costs.

29. In the present writ petitions before this Court, In such view of the matter, the writ petitions are dismissed. No costs.

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To:

1.The Commercial Tax Officer,
Evening Bazaar Assessment Circle,
191, N.S.C. Bose Road,
Chennai - 600 001

+ One cc to Mr. D. Thilakchand Chopda Advocate sR 65734
+ One cc to Special Govt Pleader (Taxes) Chennai SR 65895
KLT (co)
sg 16/11/07

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